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Supreme Court of the United States

OCTOBER TERM 1948

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No. 187

WATCHTOWER BIBLE AND TRACT SOCIETY, INC.,
GEORGE KELLY, MAURICE L. HARE
and EARL W. HITCH
Petitioners
v.
METROPOLITAN LIFE INSURANCE COMPANY
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW YORK COUNTY
STATE OF NEW YORK

◆

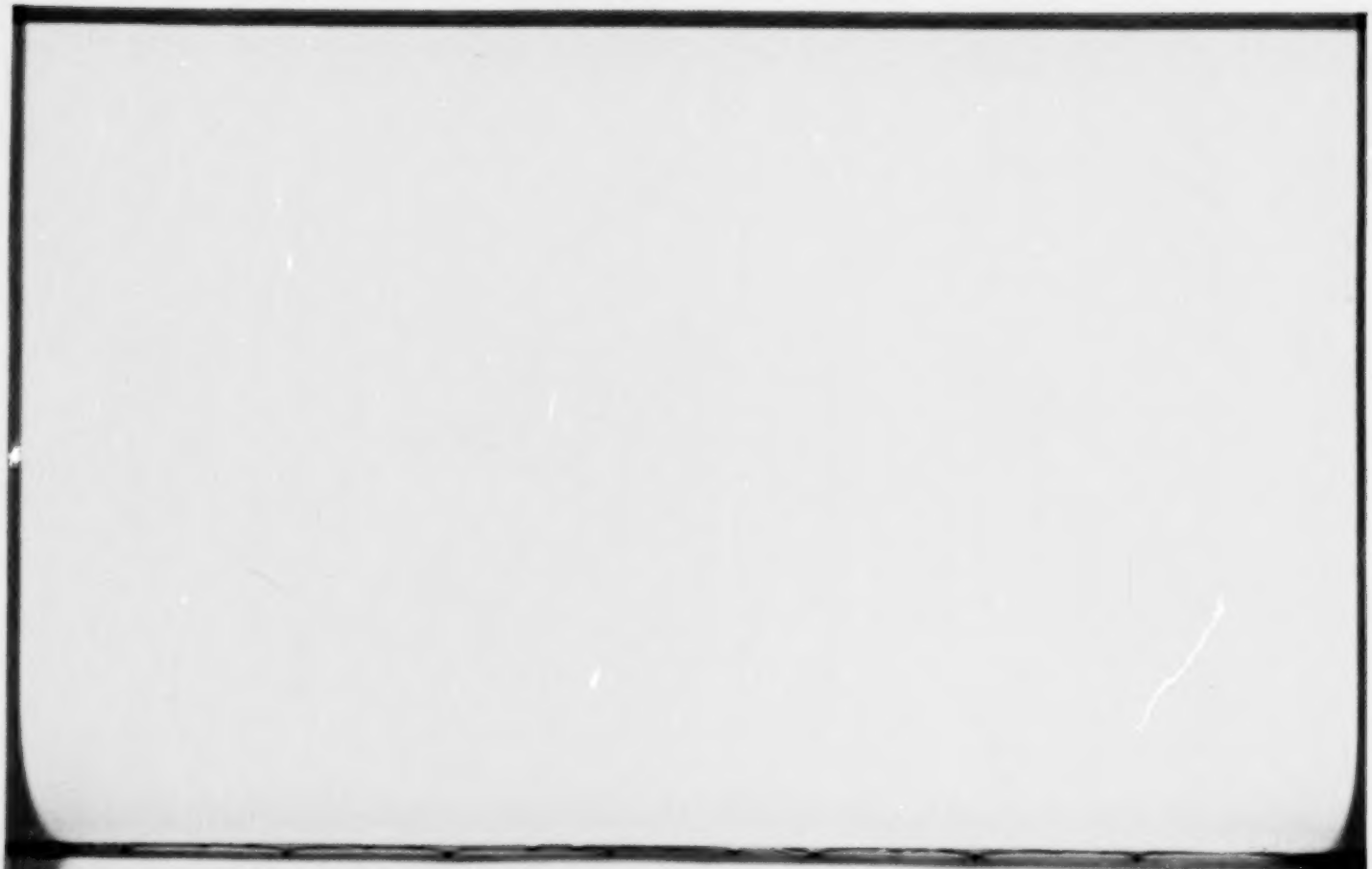
No. 400

DAN LEROY HALL
Appellant
v.
COMMONWEALTH OF VIRGINIA

APPEAL FROM THE SUPREME COURT OF APPEALS
OF THE COMMONWEALTH OF VIRGINIA

JOINT PETITION FOR REHEARING

HAYDEN C. COVINGTON
GROVER C. POWELL
Counsel



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On Petition for Writ of Certiorari
to the Supreme Court of New York County
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DAN LEROY HALL
Appellant
v.
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Appeal from the Supreme Court of Appeals
of the Commonwealth of Virginia

JOINT PETITION FOR REHEARING

May it Please the Court:

Now come the petitioners and the appellant in the above causes within the time fixed by order of the Court and

present their joint petition for rehearing. As grounds they show the Court the following:

I

The Court should have granted the petition for writ of certiorari in the exercise of sound discretion upon the grounds stated in the petition.

II

The Court erred in granting the motion to dismiss the appeal because a substantial federal question was presented, as disclosed in the statement as to jurisdiction of this Court.

DISCUSSION

The state action in these cases (judicial interpretation of the common law in the New York case, and of the statute in the Virginia case) approves that type of law which enables a landlord to make a community determination that house-to-house exercise of constitutional rights may be prohibited in an apartment community or housing project.

If the community determination in these cases had been by ordinance the action would have been unconstitutional under the decisions of this Court. (*Martin* v. *Struthers,* 319 U. S. 141. Compare *Lovell* v. *Griffin,* 303 U. S. 444; *Schneider* v. *State,* 308 U. S. 147; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Largent* v. *Texas,* 318 U. S. 418; *Murdock* v. *Pennsylvania,* 319 U. S. 105; *Follett* v. *McCormick,* 321 U. S. 573) Door-to-door calls for the purpose of distribution of literature are traditionally a proper exercise of a right guaranteed by the Constitution. (*Schneider* v. *State,* 308 U. S. 147; *Murdock* v. *Pennsylvania,* 319 U. S. 105; *Martin* v. *Struthers,* 319 U. S. 141) This Court has held that the operator of a housing project could not treat such door-to-door callers as trespassers in defying the rule of the

manager of the project which forbade such practice. (*Tucker* v. *Texas*, 326 U. S. 517)

It seems quite obvious that there is a direct conflict between the two decisions below and the former decisions of this Court referred to above. If not, then certain it is that there has been such a departure from the principles of such decisions as to present grave and serious questions that should be determined by this Court.

The New York decision has been criticized in a note appearing in 48 COLUMBIA LAW REVIEW 1106-1107, November, 1948. Because the discussion agrees with the position taken here it is quoted in this petition. The writer says:

"Efforts to restrict or control the activities of religious groups by means of statutes or municipal ordinances abridging their right to use the streets have been thwarted by the Supreme Court,[1] except when clearly directed at specific perils to public order[2] or safety.[3] That the streets were the private property of a company town, and the regulation promulgated by individuals in a private capacity, has not been regarded as significant.[4] Similar treatment has been accorded to governmental restrictions on door-to-door canvassing for religious purposes.[5] The Court

[1] "Jamison v. Texas, 318 U.S. 413 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Lovell v. Griffin, 303 U.S. 444 (1938); *cf.* Hague v. CIO, 307 U.S. 496 (1939).

[2] "Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (conviction for use of abusive language in public street upheld).

[3] "Cox v. New Hampshire, 312 U.S. 569 (1941) (requirement of license to hold parade upheld); *cf. In re* Whitmore, 47 N.Y.S. 2d 143 (Dom. Rel. Ct. 1944) (vaccination requirement upheld against challenge on religious grounds).

[4] "Marsh v. Alabama, 326 U.S. 501 (1946); *accord*, Tucker v. Texas, 326 U.S. 517 (1946) (U.S. Govt. agency); *see* Hague v. CIO, 307 U.S. 496, 515 (1939).

[5] "Follett v. Town of McCormick, 321 U.S. 573 (1944); Martin v. Struthers, 319 U.S. 141 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Jones v. City of Opelika, 319 U.S. 103 (1943), *vacating* Jones v. City of Opelika, 316 U.S. 584 (1942); Largent v. Texas, 318 U.S. 418 (1943); Schneider v. State, 308 U.S. 147 (1939); *accord*, People v. Barber, 289 N.Y. 378, 46 N.E. 2d 329 (1943).

has indicated that absolute exclusion of the colporteur from private homes may be predicated only upon the individual householder's affirmative expression that he desires it,[6] the theory being that the privilege not to listen is his alone to exercise.[7]

"In the instant case, it apears that the regulation would be unconstitutional if promulgated[8] or enforced[9] by a governmental authority. It is true that precedent is concerned with individual homes and that here apartment dwellings are involved. Physical limitations on urban development, however, have necessitated vertical, rather than horizontal expansion in housing construction, and just as the approach to individual homes is by way of the streets and private walks, so does access to individual apartments require the use of inner hallways.

"Government prohibition of the use of the hallways would be proper if predicated upon the householder's manifestation of a desire to exclude the colporteur.[10] The regulation here sustained, however, places the burden of securing permission to enter upon the plaintiff,[11] a restriction in accord with an earlier state decision,[12] but since disapproved by the Supreme Court.[13]

"If, therefore, there has been such 'state action' as to bring the case within the purview of the Fourteenth Amendment, the plaintiffs may invoke the protection of the Constitution.[14] While the defendant is a private corporation,

[6] "*See* Martin v. Struthers, 319 U.S. 141, 147-48 (1943).

[7] "*See id.* at 143.

[8] "See Note [5] *supra.*

[9] "Tucker v. Texas, 326 U.S. 517 (1946); Marsh v. Alabama, 326 U.S. 501 (1946).

[10] "See Note [6] *supra.*

[11] "Instant case at 348, 79 N.E. 2d at 436.

[12] "People v. Bohnke, 287 N.Y. 154, 38 N.E. 2d 478 (1941).

[13] "*See* Martin v. Struthers, 319 U.S. 141, 148 n. 12 (1943).

[14] "*Cf.* 33 VA. L. REV. 643 (1947); Hale, *Force and the State,* 35 COLUMBIA LAW REVIEW 149, 179, 180, 198-99 (1935).

there are several factors present which may well justify a finding that the action taken is governmental in nature. The defendant, without specific statutory authorization,[15] would not have been able to engage in the construction of housing projects, the public purpose of which has been explicitly recognized by the legislature [16] and the courts.[17] It seems arguable that such an authorization, enabling a private corporation to exercise the functions of a governmental body over a community many times larger than a great number of towns and villages, should carry with it a correlative subjugation to the constitutional limitations which restrict the activities of the latter. Moreover, whatever coercive substance the regulation in this case might contain would depend in the final analysis upon the implicit threat of judicial enforcement. Considering the broad interpretation recently given to the 'state action' principle by the Supreme Court,[18] the cumulative effect of these factors may place the defendant's conduct within the ambit of constitutional limitation.

"This is not to say, however, that defendant is without means to protect its tenants from unwanted intrusions. The apartment dwellers who do not wish to be disturbed in their homes may designate the defendant as agent for the implementation of this desire. Where all tenants have done this, there is no longer a reason for permitting the canvasser to use the inner hallways. But where such tenant action falls short of unanimity, the defendant exceeds its mandate by barring colporteurs from those apartments from which they have not been expressly excluded by the

[15] "N. Y. Ins. Law § 84; *cf.* N. Y. Const. Art. 18 § 1.

[16] "N. Y. Redevelopment Companies Law § 1; N. Y. Ins. Law § 84.

[17] "Matter of Murray v. LaGuardia, 291 N.Y. 320, 52 N.E. 2d 884 (1943).

[18] "Hurd v. Hodge, 334 U.S. 24 (1948); Shelley v. Kraemer, 334 U.S. 1 (1948).

tenant, and from the use of the hallways where needed to reach such apartments." (48 COL. L. REV. 1106-1107)

It should be remembered that there was no trespass against the tenants in these cases. The holding that there was an alleged trespass against the landlord who, in each case, made a community determination is unconstitutional because the decision does not leave the determination to each tenant where it belongs. This is contrary to the principle of *Marsh* v. *Alabama,* 326 U. S. 501, and *Martin* v. *Struthers,* 319 U. S. 141.

The rule of the decisions below should not be allowed to stand without review by this Court. The symmetry of the structure of the law pronounced by the Court under the First Amendment in cases involving Jehovah's witnesses has been broken by the holdings. To allow the holdings to pass without discussion now by this Court will only result in future and certain conflicts and confusion in the decisions of the state and federal courts on the question. Note the present holdings conflicting with those of the courts below. (*Woods* v. *Carol Management Corp.,* 168 F. 2d 791 (C. A. 2d); *Massachusetts* v. *Richardson,* 313 Mass. 632, 48 N. E. 2d 678)

The Court should remember that grave questions affecting the civil liberties guaranteed to the people are not settled until this Court has promulgated its solemn decision and the justices of the Court have expressed their opinion. In the cases involving the clash of such rights with the flag salute and license tax laws the refusal to review (*Coleman* v. *City of Griffin,* 302 U. S. 636; *Hering* v. *State Board of Education of State of New Jersey,* 303 U. S. 624; *Gabrielli* v. *Knickerbocker,* 306 U. S. 621; *Bowden* and *Sanders* v. *Fort Smith,* 314 U. S. 651; judgment vacated, 315 U. S. 793, 316 U. S. 584) did not help settle or solve the problems because the boiling controversy continued to wash the problems back to the door of the Court until finally they were considered and the question decided.

(*Lovell* v. *Griffin,* 303 U. S. 444; *Minersville* v. *Gobitis,* 310 U. S. 586, *reversed* in *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, probable jurisdiction noted at 317 U. S. 621; *Murdock* v. *Pennsylvania,* certiorari granted at 318 U. S. 748 [See *Jones* v. *Opelika,* 316 U. S. 584, judgment vacated and petition for reargument granted at 318 U. S. 796, opinion at 319 U. S. 103], opinion at 319 U. S. 105; *Martin* v. *Struthers,* appeal dismissed at 317 U. S. 589, judgment vacated and probable jurisdiction noted at 318 U. S. 739, opinion at 319 U. S. 141)

Inasmuch as the activity of Jehovah's witnesses is national, rather than local, and since forty-six percent of all the householders in the United States are tenants (See *Housing Statistics Handbook,* United States Government Printing Office, 1948, page 60) the problem will soon be confronted from some other jurisdiction. The percentage of people who occupy homes as tenants is greater in the cities, where the activity of Jehovah's witnesses is greater, than in the rural sections of the country. New York City is a good example. Only 26.7% of the householders in New York City live in single dwellings; 73.3% are tenants, householders living in multiple dwellings. 35.1% of all the people live in large apartment buildings, built to accommodate more than ten families. See *Housing Statistics Handbook,* page 47, *supra.* A survey of 140 municipalities and municipal districts of the United States reveals that among the 17,217,317 householders only 37.3% own the homes in which they live. See 16th Census of the United States, 1940, *Housing,* Vol. 1, page 37.

It is respectfully submitted that now is the time to consider the problem and decide the issues. The nature of the controversy, the kind of holdings below, the apparent conflict with the decisions of this Court and the departure from principles of the First Amendment should persuade a sufficient number of the justices to join Justices Murphy and Douglas in their vote for review of the cases. See

Jackson, J. in *Hirota* v. *MacArthur*, Nos. 239-240 October 1948 Term, December 6, 1948, 17 LAW WEEK 4043.

WHEREFORE petitioners and appellant pray that the orders of this Court made in these cases December 6, 1948, be vacated and set aside; that, upon consideration of this petition, the writ of certiorari be ordered granted in the New York case and probable jurisdiction be noted in the Virginia case; and that the cases be set down for oral argument and submission upon the substantial federal questions presented.

Respectfully submitted,

HAYDEN C. COVINGTON

GROVER C. POWELL

Counsel

CERTIFICATE

The undersigned counsel for petitioners and appellant hereby certifies that the foregoing joint petition for rehearing is prepared and filed in good faith so that justice may be done, and not for the purpose of delay.

HAYDEN C. COVINGTON

Counsel

December 24, 1948.